

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
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In re Application of)	
Rainbow Broadcasting Company)	GC Docket No. 95-172
)	File No. BMPCT-910625KP
For an Extension of Time to Construct)	File No. BMPCT-910125KE
and)	File No. BTCCT-911129KT
For an Assignment of its)	
Construction Permit for Station)	
WRBW(TV), Orlando, Florida)	

To: The Commission

**REPLY TO OPPOSITIONS TO PETITION FOR
LEAVE TO INTERVENE TO FILE EXCEPTIONS AND REOPEN THE RECORD**

Guy Gannett Communications ("Gannett"), by its attorneys, hereby replies to the Comments filed by Press Broadcasting Company ("Press") and the Oppositions (the "Oppositions") filed by the Separate Trial Staff ("Staff"), and Rainbow Broadcasting Limited and Rainbow Broadcasting Company (collectively "Rainbow") against Gannett's Petition for Leave to Intervene to File Exceptions and Reopen the Record (the "Petition") in the above captioned proceeding.^{1/}

None of the Oppositions take issue with the substance of Gannett's Petition, namely that there is no basis in the record for any adverse conclusions against Gannett. In fact, the Staff's Opposition and Press's Comments support Gannett's position in that respect. Staff Opposition ¶ 4; Press Comments ¶ 2. The only issue raised in the Oppositions is one of procedure. Gannett, however, complies with these procedural requirements. As a matter of fact, the Oppositions' arguments that Gannett has not demonstrated justification for reopening the record overlook Gannett's principal message that the existing record does not support the findings of the Initial Decision and that the

^{1/} The Oppositions were filed with the Commission on October 7, 1997 and sent to Gannett's attorneys via United States mail. Since this matter is pending before the Commission and pursuant to sections 1.45(b) and 1.4 of the Commission's rules, Gannett's reply is timely.

record need not be reopened. Indeed, should the Commission agree with Gannett, then this fifteen-year-old proceeding^{2/} is only minimally delayed, if at all. Gannett requests that the record be reopened only if the Administrative Law Judge's ("ALJ") findings regarding Gannett are not stricken. In the event that further evidence is required, the Commission should apply its procedural standard that it has long followed for this specific scenario instead of the inapplicable generalized criterion that the Oppositions present. At the least, the Commission should recognize the unjust injury Gannett has suffered by having its good name tarnished without having the opportunity to defend itself or correct the record. Under these circumstances, the Commission should exercise its broad equitable power to grant Gannett's Petition.

I. GANNETT'S PETITION SATISFIES THE COMMISSION'S STANDARD FOR INTERVENTION.

The Oppositions needlessly go to great lengths to argue that the Petition is procedurally defective because it does not satisfy the standard for reopening the record. These claims, however, overlook the thrust of Gannett's argument which is that the record does not support the findings in the Initial Decision. Only in the event that there is doubt as to Gannett's conduct should the record be reopened. Therefore, if the Commission agrees that the Initial Decision's suggestions of wrongdoing by Gannett are without basis in the record, then those portions of the Oppositions concerning reopening the record should be ignored.

If the record must be reopened, the Commission should not use the three-part test referenced by the Oppositions^{3/} because it is not applicable to Gannett's Petition. When a party petitions to intervene and reopen the record after the release of an Initial Decision, the Commission has long

^{2/} Rainbow Opposition ¶ 5.

^{3/} Rainbow Opposition ¶ 8; Staff Opposition ¶ 3.

held that it will grant the petition where "(1) earlier failure to seek intervention was occasioned by circumstances beyond petitioner's control; (2) the evidence offered appeared to be of decisional significance; and (3) the decision in the proceeding may have a direct bearing on the petitioner's reputation and future ability to earn a livelihood in the broadcasting industry." *West Jersey Broadcasting Co.*, 89 FCC 2d 469, 472-73 (1980); *Quality Broadcasting Corp.*, 4 RR 2d 865 (1965).

Gannett submits that the most important of the foregoing three factors is whether the ALJ's decision will have a direct bearing on the company's reputation and future ability to earn a livelihood in the broadcasting industry. As explained in its Petition, Gannett, as a broadcast licensee, cannot simply turn the other cheek to conclusions of wrongdoing that implicate its corporate character, and, by extension, the character of its officers responsible for implementing corporate decisions. Accusations concerning "dilatory," "suspicious," and anticompetitive conduct have already crept into other proceedings^{4/} and may ultimately affect Gannett's standing before the Commission. Indeed, the potential harm of the Initial Decision's findings is highlighted by the ALJ's suggestion that the Commission further investigate the suspected misconduct and Rainbow's allegations in opposition to the renewal of WCKF-TV's license. Moreover, Gannett is concerned that these findings will adversely impact its contractual relations with others in the broadcast industry and damage Gannett's character.^{5/}

^{4/} See *infra* note 8.

^{5/} The present facts closely resemble the facts of *West Jersey Broadcasting Co.*, 89 FCC 2d 469 (1980), where the Commission found that an Initial Decision's strong suggestion of bribery was a sufficient basis for finding that the petitioner's character had been impugned and that his ability to earn a livelihood in the communications industry had been threatened. There, the Commission found this to satisfy the third prong of the test as so should the Commission find here.

In regards to the second prong of the Commission's test for granting post-decisional intervention and reopening the record, the evidence proffered by Gannett would have significant decisional value as it will likely affect the ultimate disposition of whether Rainbow Broadcasting Company ("RBC") made misrepresentation regarding the nature of the tower litigation, a specified issue in the Hearing Designation Order. In concluding that RBC acted truthfully in its representations to the Commission, the ALJ laid blame for RBC's delays on Gannett. *See Rainbow Broadcasting Co.*, 12 FCC Rcd 4028, 4059-60 (1997). Gannett's Petition, however, clearly demonstrates that Gannett's conduct was wholly reasonable, that it did not conspire with Press in determining whether or when to construct facilities for Rainbow, and that the delay in the construction of RBC's facilities resulted, first, from RBC's inability to secure a construction permit; second, from RBC's delay in responding to inquiries from Gannett; and, finally, from the *status quo* order in Rainbow's lawsuit to prevent Gannett from leasing space on its tower to Press. Under these circumstances, this evidence will undermine the ALJ's rationale for ruling in favor of RBC on the tower litigation misrepresentation issue and call into question the credibility of Joseph Rey's testimony which may affect the disposition of the other issues in the Initial Decision.

In regards to Gannett's failure to seek intervention earlier, Gannett had not pursued intervention prior to release of the Initial Decision because it had no interests at stake in the proceeding. The issues identified by the Hearing Designation Order concerned whether Rainbow violated *ex parte* rules, misrepresented information to the Commission, deserved a construction permit waiver and satisfied the qualification requirements to be a Commission licensee. *Memorandum and Order and Hearing Designation Order*, 11 FCC Rcd 1167, 1168-69 (1995). It would have been pointless for Gannett to intervene in this proceeding when none of the issues impacted Gannett's interests. Furthermore, Gannett's relations with Rainbow and Press had been

amicable for years: Rainbow's suit against Gannett had result in a District Court ruling in Gannett's favor; Gannett and Rainbow had reached a final settlement as to the tower lease agreement; and Gannett had sold its interests in the broadcast tower where both broadcasters leased space. The designated issues in Rainbow's proceeding were simply not relevant to Gannett's broadcast business.^{6/} The ALJ should have invited Gannett to participate or sought testimony of a Gannett officer on the Gannett/Rainbow/Press relationship.

Even if Gannett had any inkling that its actions would be subject to question, the ALJ likely would have rejected Gannett's petition to intervene in as much as Gannett would not be able to demonstrate that it was a party in interest. At that time, Gannett would not be able to show that it would be "aggrieved or adversely affected by a Commission decision" in that proceeding. *Telephone and Data Systems, Inc.*, 9 FCC Rcd 2780, 2781 (1994) (citing *Algreg Cellular Engineering*, 6 FCC Rcd 5299, 5300 (Rev. Bd. 1991)). In this manner, a "broad, undifferentiated desire to participate" is an insufficient basis in order to intervene. *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 470 (D.C. Cir. 1987). Since prior to the Initial Decision's release Gannett's conduct was not subject to investigation, Gannett did not have a basis to allege injury by an adverse decision in this proceeding. Thus it is unfair, even disingenuous, for Rainbow to now argue that Gannett should have attempted to intervene years ago when Rainbow surely would have opposed Gannett's petition at that time!

Gannett's basis for intervention arose only upon release of the Initial Decision, but because Gannett did not have a stake in the proceeding nor even participated as a witness, it did not learn of the ALJ's conclusions until June after the undersigned counsel to Gannett reviewed a copy of the

^{6/} The present facts are similar to those of *West Jersey Broadcasting* where the petitioner was available to testify but was unaware of the allegations made concerning him.

decision.^{7/} Counsel also learned at that time that Rainbow was exploiting the ALJ's findings as to Gannett in its filings with the Commission.^{8/} Thereafter, Gannett reviewed the filings from the parties involved, and with reasonable dispatch initiated an internal review of the matter. This process led to the preparation of Gannett's Petition and the Baker Affidavit which required a significant amount of time since these proceedings spanned many years, involved a division of the company that was sold in 1994, required extensive internal research at Gannett, and concerned a proceeding in which Gannett was not a party. Under these circumstances, it seems wholly unreasonably and inequitable for Rainbow and the Staff to complain that Gannett is tardy in its filing.^{9/} In sum, under the Commission's standards for post-decisional intervention and reopening the record, Gannett's Petition should be granted.^{10/}

^{7/} Given the tangential relationship Gannett had with the proceeding it would be inequitable and unreasonable to impose constructive notice of the ALJ's adverse conclusions solely on the basis of the decision's release. Gannett's contacts with the proceeding were so minimal that it would be inconceivable that the ALJ would somehow implicate it in anticompetitive behavior. Consequently, Gannett should not be accountable for any delay in its response until the time that it had actual notice of the Initial Decision's findings.

^{8/} *Rainbow Broadcasting Company's Reply to Exceptions of Press Broadcasting Company, Inc. and Separate Trial Staff*, GC Docket No. 95-172, ¶¶ 6-7, 10 & n. 3 (filed May 29, 1997); *Rainbow Broadcasting Limited Reply to Exceptions*, GC Docket No. 95-172, ¶¶ 20, 23, 33, & n. 7 (filed May 29, 1997); *Reply to Oppositions to Supplement to Petition to Deny*, File No. BRCT-961001ZK, ¶¶ 9-11, 13-14 (filed May 16, 1997); *Supplement to Petition to Deny*, File No. BRCT-961001ZK ¶¶ 11 (filed May 1, 1997).

^{9/} The Staff and Rainbow argue that the proceeding should not be delayed any further. The parties, however, neglect to acknowledge that should the Commission decide that the record does not require reopening, then any delay that may result will be minimal. Moreover, since this proceeding has been ongoing for fifteen years, it would be illogical to hastily reach inaccurate conclusions purely out of a desire for closure.

^{10/} Rainbow's argument that Gannett fails to satisfy the requirements of 47 C.F.R. § 1.223 is misplaced. The language of that rule clearly contemplates a pending proceeding and is therefore inapplicable to Gannett's Petition. Furthermore, Commission precedent supports the use of the standard first set out in *Quality Broadcasting Corporation*.

II. GANNETT SATISFIES THE STANDARD FOR REOPENING THE RECORD PRESENTED BY THE OPPOSITIONS.

Gannett, as an alternative, petitions the Commission to reopen the record, but Gannett does so recognizing that this is normally a request of a party to the proceeding. The Oppositions, however, assert a standard for reopening the record that is inapplicable to Gannett's nonparty status. Nevertheless, despite Gannett's position, even under the erroneous standard asserted by the Oppositions, there is good cause to reopen the record for the reasons that follow.^{11/}

First, circumstances have dramatically changed since Gannett last had an opportunity to present the matters discussed in its Petition. Since the close of the hearing in the above-captioned proceeding, the ALJ issued an Initial Decision that gratuitously and erroneously concluded that Gannett's conduct in regards to its operation of the Bithlo Tower was suspicious and worthy of investigation by the Commission. These conclusions were not identified issues for the proceeding and Gannett has not previously had a chance to refute these accusations. Gannett has acted with reasonable promptness in investigating and preparing its response to correct the record.

Second, the evidence proffered by Gannett would likely affect the ultimate disposition of the tower litigation issue. In the Initial Decision, the ALJ concluded that RBC had not engaged in misrepresentation and had laid blame on Gannett for RBC's delays. The Petition, however, demonstrates that Gannett's conduct was not dilatory nor unreasonable and that Gannett did not collude with Press. Without Gannett's conduct to explain for the delay in constructing the

^{11/} A petition to reopen the record must (1) be based on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; (2) show that the new evidence, if proven, would raise a substantial and material question of fact affecting the ultimate outcome of the proceeding; and (3) show that there is a substantial likelihood of proving the potentially disqualifying allegations if the case were remanded for further hearings. *See Evergreen Broadcasting Co.*, 7 FCC Rcd 6601, 6602 (1992).

transmitter building, the Initial Decision's conclusions as to RBC's representations to the Commission can no longer be supported. The Baker Affidavit^{12/} raises substantial and material questions concerning Joe Rey's credibility. Therefore, it undermines the rationale for the ALJ's decision.

Third, should the case be remanded, Gannett is substantially likely to disprove the conclusions reached in the Initial Decision. As detailed in the Baker Affidavit, Gannett was instructed by Rainbow to hold off on constructing the transmitter building until Rainbow had obtained a "final" construction permit. When it became clear that in August 1990 Rainbow's construction permit would become final, Gannett took affirmative steps to address certain logistical matters and discrepancies between Rainbow's proposed building plans and Gannett's. In September 1990 Gannett and Rainbow were meeting and exchanging correspondence such that it appeared that Rainbow's personnel were pleased with the progress. Inexplicably, however, in early October 1990, Rainbow objected to Press's position on the tower—a fact it had known of for over two years.

Despite the nonexclusive provision in its contract and its acknowledgment of Press's position in FCC filings, Rainbow sought a preliminary injunction against Gannett in November 1990. Shortly thereafter a *status quo* order was imposed on the parties. Up to that point, Gannett was prepared to begin construction of the transmitter building and it was only Rainbow's own inaction that prevented the project from moving forward. Gannett's position as to Rainbow's rights to the tower was later validated when Rainbow's preliminary injunction was denied in June 1991 with a specific finding that the lease was nonexclusive. This testimony, in conjunction with relevant

^{12/} The unsolicited testimony of Mr. Baker, who has no ax to grind as to the events that took place in 1990, is entitled to great weight and is credible on its face.

documents, proves that the Initial Decision's conclusions of wrongdoing by Gannett are wholly without basis and calls into question the credibility of Joseph Rey's testimony.

III. EQUITY DEMANDS THAT THE COMMISSION GRANT GANNETT'S PETITION.

An administrative agency acting in its adjudicatory capacity can exercise broad equitable powers as long as it acts in a manner which fulfills its administrative mandate and furthers its own policies. *Cf. Morrissey v. Brewer*, 408 U.S. 471 (1972). Indeed, the agency is *obligated* to exercise its equitable powers when faced with circumstances where an innocent bystander with an unblemished record is defamed by an ALJ's findings. Such is the case with Gannett who was debased by the conclusions contained in the Initial Decision but has not been provided an opportunity to refute them. Gannett had no notice that its conduct was subject to question, was not a party to the proceeding, did not participate as a witness, and was not actually notified of the ALJ's conclusions when the Initial Decision was released. Given the consequences of these conclusions, it is patently unjust to Gannett to shoulder this burden without having the chance to defend itself.^{13/} Under these circumstances, the Commission should consider the unfairness of the Initial Decision's effect and take appropriate action to restore Gannett to its standing prior to the Initial Decision's release.

IV. CONCLUSION.

As set forth in the Petition, the ALJ's conclusions regarding Gannett's conduct has no basis in the record and no proper place in the Initial Decision. None of the parties to the proceeding take


^{13/} Gannett holds numerous Commission licenses and the Initial Decision's determinations as to Gannett may be raised in other subsequent proceedings. Therefore, should the Commission deny Gannett's Petition, then it is likely that with each instance that these conclusions are regurgitated, the Commission will need to revisit the facts of this case. Thus, the far more efficient method of addressing these conclusions would be to grant Gannett's Petition now.

issue with regard to the substance of Gannett's Petition. Moreover, the Oppositions' arguments ignore Gannett's position that the record need not be reopened. Should the Commission agree that the record does not warrant the conclusions reached in the Initial Decision, none of the parties are prejudiced and the proceeding is not delayed any further. Even if the record is reopened, the Oppositions cite to a procedural test that is inapplicable to the present circumstances and not supported by Commission precedent. At the least, the Commission should exercise its broad equitable powers to ensure Gannett has the opportunity to respond to the erroneous allegations contained in the Initial Decision.

Under these circumstances, Gannett's Petition to Intervene to File Exceptions and Reopen the Record should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deborah L. Gorham, a legal secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 20th day of October, 1997, I sent the above "Reply to Oppositions to Petition for Leave to Intervene to File Exceptions and Reopen the Record," via first-class mail, postage-prepaid, to the following:

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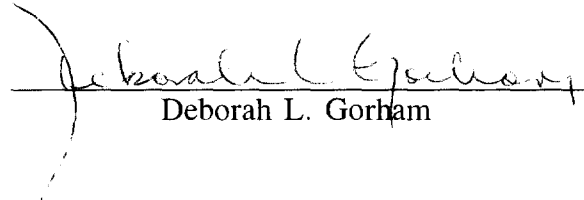
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